No. 94-994

# In the Supreme Court

OF THE

# United States

OCTOBER TERM 1994

SUPREME COURT, U.S.
FILED
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DENARD M. FOBBS, M.D.,
*Petitioner,*
VS.
HOLY CROSS HEALTH SYSTEM CORPORATION, a California Corporation, doing business as SAINT AGNES HOSPITAL and MEDICAL CENTER; CYNTHIA BERGMANN, M.D.; JAMES CAHILL, M.D.; JAY CHRISTENSEN, M.D.; CHARLES GAVIN, M.D.; SEUNG NAM KIM, M.D.; ROBERT MELTVEDT, M.D.; MARSHALL NOEL, M.D.; MORTON ROSENSTEIN, M.D.; ROYDON STEINKE, M.D.; ROBERT WILSON, M.D.; and LARRY E. NIX, M.D.,
*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## RESPONDENTS' BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Did the United States Court of Appeals for the Ninth Circuit correctly uphold summary judgment on Petitioner's 42 U.S.C. § 1981 claim based upon the expiration of the statute of limitations pursuant to the standards established by this Court's decision in *Delaware State College v. Ricks*, 449 U.S. 250 (1980)?

2. Did the United States Court of Appeals for the Ninth Circuit correctly decline to apply state law tolling doctrines to the accrual of Petitioner's 42 U.S.C. § 1981 claim?

3. Did the United States Court of Appeals for the Ninth Circuit correctly uphold summary judgment on the Sherman Antitrust Act claim where Respondents' imposition of summary monitoring and subsequent summary suspension of Petitioner's medical staff privileges were found by the courts below to have complied with the Health Care Quality Improvement Act standards for such peer review actions?

## PARTIES TO THE PROCEEDING

The parties to the proceeding are as stated in the petition. Pursuant to Supreme Court Rule 29.1, Respondent St. Agnes Medical Center, a California non-profit corporation, and Respondent Holy Cross Health System Corporation, an Indiana not for profit corporation, are wholly-owned subsidiaries of the Congregation of the Sisters of the Holy Cross, an Indiana not for profit corporation. Respondent corporations have no other subsidiaries (other than wholly-owned subsidiaries) within the meaning of Supreme Court Rule 29.1.

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HOLY CROSS HEALTH SYSTEM CORPORATION, a California Corporation, doing business as SAINT AGNES HOSPITAL and MEDICAL CENTER; CYNTHIA BERGMANN, M.D.; JAMES CAHILL, M.D.; JAY CHRISTENSEN, M.D.; CHARLES GAVIN, M.D.; SEUNG NAM KIM, M.D.; ROBERT MELTVEDT, M.D.; MARSHALL NOEL, M.D.; MORTON ROSENSTEIN, M.D.; ROYDON STEINKE, M.D.; ROBERT WILSON, M.D.; and LARRY E. NIX, M.D.,
*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully pray that this Court decline to issue a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit entered July 19, 1994, which upheld dismissal of certain discrimination and antitrust claims arising from the imposition of summary monitoring and suspension of Petitioner's medical staff privileges.

Straining to find grounds upon which to seek review of the lower courts' findings, Petitioner disregards the record and ignores the clear standard for accrual of a claim under 42 U.S.C. § 1981 established by this Court in *Delaware State College v. Ricks*, 449 U.S. 250 (1980). The statute commenced to run when he was notified of the summary suspension. The Ninth Circuit properly concluded, on the basis of the record, that Petitioner failed to meet the threshold requirements for application of state law equitable tolling doctrines.

Dismissal of Petitioner's Sherman Antitrust Act claim complied with the clear and unambiguous language of the Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11112(c)(2). The Ninth Circuit found "ample medical justification" in the administrative record for the summary imposition of restrictions on Petitioner's medical staff privileges and properly affirmed the District Court's judgment that the proceedings complied with HCQIA standards for peer review actions.

The Petition is nothing more than a request to reweigh and reexamine the lower courts' findings and presents no substantial question warranting review by this Court.

## STATEMENT OF CASE

The pertinent facts and procedural history are cogently digested in the opinions of the District Court (Pet.App. 28a-35a and 68a-72a) and the Ninth Circuit (Pet.App. 8a-10a). Petitioner's Statement of the Case omits or misstates the following material facts relied upon by the lower courts in rendering their decisions.

Petitioner was a member of the Department of Obstetrics-Gynecology/Perinatology at Respondent Saint Agnes Medical Center from 1982 until he was summarily suspended on August 26, 1988. This suspension was effective

immediately upon imposition and Petitioner received notice of the suspension on August 29, 1988. (Pet.App. 28a.) This action was taken in response to Petitioner's performing a cesarean section without obtaining a consultation as required under certain monitoring requirements that had been summarily imposed upon Petitioner on June 23, 1987 and Petitioner's indication that he would not comply with the monitoring requirements in the future. (Pet.App. 33a-34a.)

In 1987, Petitioner had been granted temporary privileges to perform intra-abdominal laser surgery. (Pet.App. 28a.) After the first several cases performed by Petitioner, there were some concerns raised as to possible irregularities with respect to Petitioner's handling of these cases. An outside expert, Donald R. Ostergard, M.D., one of Petitioner's former mentors in intra-abdominal surgery, was consulted to review the cases. (Pet.App. 8a and 28a.) Dr. Ostergard concluded that Petitioner had used poor judgment in leaving one laser patient under anesthesia to deliver another obstetrical patient; had performed an unnecessary dilation and curettage on another patient and in a third case had shown lack of judgment in performing vaporization of endometriosis. In addition, Dr. Ostergard reported that these patients did not have a written or dictated history and physical examination on their charts at the time of the laser procedures. (Pet.App. 8a.) Shortly after the report was received, Dr. Fobbs wrote the hospital and claimed that he had done nothing wrong. (Pet.App. 9a.)

On June 23, 1987, the Medical Executive Committee (MEC) summarily imposed monitoring and consultation requirements on patients admitted by Petitioner to Saint Agnes Medical Center. (Pet.App. 9a.) At Petitioner's request, Judicial Review Committee (JRC) hearings were conducted in September of 1987 which affirmed the decision of the MEC to continue the monitoring requirements. Upon a stipulated order of the Appeal Board of the Board of

Trustees, the JRC hearing was reopened in January of 1988 to receive additional oral and documentary evidence. (Pet.App. 30a-31a.) The reopened JRC again affirmed the MEC's decision. (Pet.App. 31a.)

Upon Petitioner's appeal of the JRC's decision, the Board of Trustees of Saint Agnes Medical Center remanded the matter for a *de novo* hearing before a newly constituted JRC (hereinafter JRC Remand Hearing) on the grounds that Petitioner's counsel had wrongly been denied the right by the hearing officer to *voir dire* members of the JRC. The MEC acknowledged that Petitioner should have been allowed to *voir dire* members of the JRC. (Pet.App. 32a.)

On July 15, 1988, Petitioner announced that he would not participate in the remanded proceedings and would not appear at the scheduled *voir dire* of the JRC or the JRC Remand Hearing on August 1, 1988. The JRC Remand Hearing determined that Petitioner's withdrawal and failure to participate further in the proceedings was without good cause; Petitioner was deemed to have voluntarily accepted the monitoring requirements. (Pet.App. 33a.) Petitioner, however, was still permitted to admit and treat patients at the Saint Agnes Medical Center subject to the monitoring requirements. (Pet.App. 33a.)

Petitioner's medical staff privileges were thereafter summarily suspended on August 26, 1988 because Petitioner refused to comply with the monitoring requirements. This suspension was effective upon imposition. Petitioner received notification of the summary suspension on August 29, 1988. He was advised that he had the right to request a hearing regarding the summary suspension within fifteen (15) days. This deadline was subsequently extended for an additional fifteen (15) days. (Pet.App. 10a, 34a and 71a.)

On September 8, 1988, Petitioner filed a complaint with the Office for Civil Rights of the United States Department

of Health and Human Services (OCR) against Saint Agnes Medical Center (not Physician Respondents) alleging discrimination on the basis of race, color and national origin. (Pet. 12a.)

On September 29, 1988, Petitioner stated he would not appeal the summary suspension. On October 10, 1988, Petitioner was sent a letter confirming the fact that, by not requesting a Judicial Review Hearing within the allotted time, Petitioner had waived his right to a hearing and was deemed to have accepted his summary suspension. (Pet.App. 35a.)

In August of 1989, the OCR and Saint Agnes Medical Center entered into a Voluntary Settlement Agreement. Petitioner informed Saint Agnes Medical Center and OCR that he refused to accept the terms of the Settlement Agreement. (Pet.App. 35a.)

On September 29, 1989, Petitioner filed a complaint against Respondents, Holy Cross Health System Corporation and its subsidiary Saint Agnes Hospital and Medical Center (collectively Saint Agnes), and eleven (11) defendant physicians (collectively Physician Respondents) alleging federal claims for civil rights and antitrust violations arising from the imposition of monitoring requirements and summary suspension of his medical staff membership pursuant to: (1) the Sherman Antitrust Act; (2) 42 U.S.C. § 1981; (3) Title VI of the Civil Rights Act of 1964 (against Saint Agnes only); and (4) 42 U.S.C. § 1985(3). (Pet.App. 35a.)

The District Court subsequently dismissed with prejudice Petitioners § 1985(3) claim against Physician Respondents and his Title VI Claim against Saint Agnes for failure to state a claim; granted Physician Respondents' Motion for Partial Summary Judgment as to Petitioner's § 1981 claim on the grounds that the claim was time barred; and granted

Respondents' Motion for Summary Judgment as to Petitioner's claim for relief under the Sherman Antitrust Act on the basis that the qualified immunity from such a claim under the Health Care Quality Improvement Act of 1986, 42 U.S.C. §§ 11101 *et seq.* applied.

Petitioner appealed the judgment of the District Court to the United States Court of Appeals for the Ninth Circuit. On July 19, 1994, the Ninth Circuit *reversed* the District Court's dismissal of Petitioner's § 1985(3) claim against Physician Respondents and his Title VI claim against Saint Agnes finding that on the pleadings, causes of action could be stated with respect to alleged racial discrimination against Dr. Fobbs individually. Dismissal was *affirmed* with respect to allegations of discrimination against Dr. Fobbs' patients. (Pet.App. 26a.) The Ninth Circuit also *affirmed* the District Court's grant of summary judgment with respect to Petitioner's § 1981 claim and Petitioner's Sherman Antitrust Act claim. *Id.* at 26a-27a.

## REASONS FOR DENYING THE WRIT

### I.

### The United States Court of Appeals for the Ninth Circuit correctly upheld summary judgment on Petitioner's 42 U.S.C. § 1981 claim based upon the expiration of the statute of limitations pursuant to the standards for accrual established by this Court.

#### A. Petitioner's cause of action accrued on the date Petitioner was notified that he was summarily suspended.

Petitioner fundamentally misapprehends the standard governing the accrual of a cause of action under 42 U.S.C. § 1981 established by this Court. Pursuant to the authority of *Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980) and *Chardon v. Fernandez*, 454 U.S. 6 (1981),

Petitioner's cause of action accrued on August 29, 1988, the date that the MEC notified Petitioner that it had summarily suspended his medical staff privileges. The notice stated that Petitioner could request a hearing on the matter within fifteen (15) days, which he failed to do. The summary suspension became effective immediately upon imposition and remained in effect pending the outcome of a hearing, had Petitioner requested one. (Pet.App. 35a.)

That conclusion is inescapable when the record below is read in the context of controlling precedent. In *Delaware State College*, the limitations period commenced on the day that the tenure decision was made and communicated to the plaintiff (Ricks), even though Ricks' employment with the college was not terminated until a later date. This Court reasoned that grievance procedures, such as the ability to request a hearing, "by its nature, is a remedy for a prior decision, and not an opportunity to influence that decision before it is made." 449 U.S. at 261. The alleged wrongful denial of Ricks' tenure was the discriminatory act triggering the accrual of the claim and that denial was held to be effective upon Ricks' receiving *notification.* (*Compare* Pet.App. 12a and 16a.)

Similarly, in *Chardon*, the limitations period was held to run from the time of notice that plaintiffs' appointments as non-tenured administrators would terminate. 454 U.S. at 8.

Following this Court's well-settled precedent, the Ninth Circuit properly held in the present action that a discrimination claim cognizable under federal law accrues at the time petitioner knows or should have known of the allegedly discriminatory decision.

**B. There was no "continuing violation" of 42 U.S.C. § 1981 by virtue of notices advising Petitioner of his remedies following the MEC's summary suspension of his medical staff privileges on August 26, 1988.**

Turning to Petitioner's claim of an alleged "continuing violation" under 42 U.S.C. § 1981, there is no showing of discriminatory acts beyond his summary suspension of medical staff privileges on August 26, 1988 as required under *Delaware State College, supra*, 449 U.S. at 258 and 260. In order to toll commencement of the limitations period *after* the date of the decision to deny Ricks' tenure, this Court stated:

> "Ricks would have had to allege and prove the manner in which his employment was terminated differed discriminatorily from the manner in which the college terminated other professors who had been denied tenure." *Id.* at 258.

Here, as in the prior decisions of this Court, Petitioner made no factual showing of "illegal acts subsequent to the date on which the decisions to terminate [or in this case, to suspend medical staff privileges] were made . . ." *Chardon, supra*, 454 U.S. at 8. Hence, the action was time barred if not brought within one year after being notified of the suspension. *Delaware State College, supra*, 449 U.S. at 258.

Petitioner nevertheless contends that the statute should have been tolled until October 10, 1988 when he received a letter finalizing his suspension and rejecting Petitioner's request for what he perceived to be "fair hearing conditions." (Pet. 14 and Pet.App. 16a.) The record amply supports the lower courts' findings that "beyond his conclusory allegation that the hearing procedure [afforded by MEC] would have been 'unfair,' Dr. Fobbs has not alleged that 'after August 26, 1988, he was treated differently than other Medical Staff Members.' . . . Dr. Fobbs fails to show

how Defendants discriminated against him by adhering to St. Agnes bylaws in conducting their hearings and review process." (*Id.* at 16a.)

Petitioner's argument also ignores the well-settled rule stated in *London v. Coopers & Lybrand*, 644 F.2d 811, 818 (9th Cir. 1981):

> "[O]ur focus in determining whether the alleged civil rights violation is 'continuing' is upon the issue of whether a present violation still exists, not upon the present effect of a past employment decision . . . Absent special circumstances, a single act by an employer adverse to an employee's interest, such as a discharge, layoff, or failure to transfer or promote, begins running of the statute of limitations and *natural effects* of the allegedly discriminatory act are not regarded as 'continuing.'" (Emphasis Added.)

Accordingly, Petitioner failed to demonstrate that "independent acts of discrimination" continued beyond the date of the MEC's decision to summarily suspend his medical staff privileges. *Delaware State College, supra*, 449 U.S. at 257 n.8. (Pet.App. 16a-17a.)

### C. Petitioner's exhaustion of internal administrative remedies did not toll the statute of limitations.

Petitioner further erroneously maintains that federal law requires that he exhaust his internal administrative remedies before a decision is "final." (Pet. 13 and Pet.App. 15a-16a.) There is no requirement that he "exhaust his internal administrative remedies" prior to filing a § 1981 claim. *Delaware State College* expressly rejected the tolling of the limitations period pending internal administrative remedies. The "pendency of a grievance, or some other method of collateral review of an employment decision, does not toll the running of the statutory period." 449 U.S. at 261 citing *Electrical Workers v. Robbins Myers, Inc.*, 429 U.S. 229

(1976). *Accord Gonzalez v. Shanker*, 533 F.2d 832 (2d Cir. 1976); *Cheyney State College Faculty v. Hufstedler*, 703 F.2d 732 (3d Cir. 1983); *Goss v. Revelon, Inc.*, 548 F.2d 405 (2d Cir. 1976); *Jones v. Niagara Frontier Transp. Auth.*, 524 F. Supp. 233 (W.D.N.Y. 1981); *Mir v. Little Co. of Mary Hosp.*, 844 F.2d 646 (9th Cir. 1988). (*See* Pet.App. 12a, 16a and 73a.)

Petitioner attempts to distinguish this consistently applied line of authority by suggesting he did not receive "unequivocal" notification of his suspension or the procedures by which he might challenge that action. (Pet. 12-13.) His contention is belied by the lower courts' findings, and his reliance upon *Hoesterey v. City of Cathedral City*, 945 F.2d 317 (9th Cir. 1991) is misplaced. Consistent with the reasoning of *Delaware State College* and its progeny, *Hoesterey* found that plaintiff's claim for discriminatory termination did not accrue because he was not properly advised *in writing* of his right to a pre-termination hearing. Because of the defective notice the statute was tolled until the last day of plaintiff's employment. *Id.* at 320.

By contrast, in the present case, notice of suspension was admittedly received and Petitioner was specifically advised by that notice of his right to request a hearing within 15 days thereafter. (Pet.App. 34a and 68a-69a.)

## II.

## The United States Court of Appeals for the Ninth Circuit correctly declined to apply state law tolling doctrines to the accrual of Petitioner's 42 U.S.C. § 1981 claim.

### A. The statute of limitations was not tolled under California's equitable tolling doctrine.

Although California's one-year statute of limitations applies to Petitioner's § 1981 claims, federal law governs when

the claim accrues and the limitations period begins to run. *Chung v. Pomona Valley Community Hosp.*, 667 F.2d 788, 791 (9th Cir. 1982). Petitioner failed to satisfy the threshold requirements for application of state law equitable tolling doctrines. (Pet.App. 13a.)[1]

Petitioner made no showing that "applying the equitable tolling doctrine to a § 1981 claim would not be inconsistent with federal policy." (Pet.App. 14a.) Petitioner's Title VI grievance through the OCR was not designed to address the same wrongs and grant the same remedies as a § 1981 claim as required by *Johnson v. Railway Express Agency,* 421 U.S. 454, 461 (1975). (Pet.App. 14a-15a.) Pursuit of Title VI remedies does not toll the statute of limitations applicable to a § 1981 claim in any event. *Chambers v. Omaha Pub. Sch. Dist.*, 536 F.2d 222, 230-31 (8th Cir. 1976).

As the Ninth Circuit stated: "Congress has not proscribed civil rights plaintiffs from filing § 1981 actions while an OCR investigation is pending. Furthermore, Dr. Fobbs has made only a conclusory showing, insufficient under *Railway Express Agency,* that OCR procedures and his § 1981 claim were designed to address the same wrongs and grant the same remedies." (Pet.App. 15a). Thus, Petitioner failed to meet the threshold requirements necessary to invoke California's equitable tolling doctrine. *Accord Donoghue v. County of Orange,* 848 F.2d 926, 930 and 931 (9th Cir. 1987); *Chardon v. Fumero Soto,* 462 U.S. 650, 657 (1983); *Arnold v. United States,* 816 F.2d 1306, 1312 (9th Cir.

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[1]State tolling laws are only applicable to federal causes of action to the extent that they are not inconsistent with the Constitution or other federal law. *Donoghue v. County of Orange,* 848 F.2d 926, 930 (9th Cir. 1987); *Conerly v. Westinghouse Elec. Corp.*, 623 F.2d 117, 119 (9th Cir. 1980). In the present case, there is no statute which requires exhaustion, nor is there an agency established to hear § 1981 claims.

1987), *Conerly v. Westinghouse Elec. Corp.*, 623 F.2d 117, 119 (9th Cir. 1980).

**B. Respondents were not "equitably estopped" from asserting the statute of limitations.**

Supported by the record below, the lower courts likewise properly found that Petitioner's equitable estoppel arguments were meritless under state or federal law. No representations were made by Respondents "regarding the statute of limitations nor when Dr. Fobbs' possible legal actions would accrue. Furthermore, it is abundantly clear from the record that Dr. Fobbs did not believe anything that the Defendants wrote or said to him, and he certainly was not misled." (Pet.App. 17a.)

## III.

**The United States Court of Appeals for the Ninth Circuit correctly upheld summary judgment on the Sherman Antitrust Act claim where Respondents' imposition of summary monitoring and subsequent summary suspension of Petitioner's medical staff privileges were found by the courts below to have complied with the Health Care Quality Improvement Act standards for such peer review actions.**

**A. The Health Care Quality Improvement Act expressly allows that a summary restraint may be imposed "where the failure to take such action may result in an imminent danger to the health of any individual."**

Disposing of Petitioner's Sherman Antitrust Act claim, the Ninth Circuit correctly interpreted the Health Care Quality Improvement Act ("HCQIA"), 42 U.S.C.

§ 11112(c)(2), in keeping with the clear and unambiguous language of the statute itself:

> "subject to subsequent notice and hearing and other adequate procedures, where the failure to take such action *may* result in an imminent danger to the health of any individual." (Emphasis Added.)

Thus, contrary to Petitioner's position (Pet. 15-16), "the statute *does not require imminent danger* to exist before a summary restraint may be imposed. It only requires that the danger *may* result if the restraint is not imposed." (Pet.App. 9a.) (Emphasis added.)

Without citation to any authority, Petitioner urges that a different standard should apply under HCQIA before summary restraints are imposed. He suggests that "merely because there *may* be a danger in the future, then the Ninth Circuit has completely eliminated all protections for all doctors from summary restrictions of privileges." (Pet. 15.) Such fears are overblown, particularly when viewed against the factual background of the lower courts' findings.

The Ninth Circuit found "ample medical justification" in the administrative record for the MEC's summary imposition of monitoring; *i.e.,* that there was no legitimate factual dispute that the potential for imminent danger existed when the restraint was imposed. An outside expert, who was consulted by the MEC prior to the imposition of the restraint, found that Dr. Fobbs used poor judgment in leaving a laser patient under anesthesia to deliver another obstetrical patient; performed an unnecessary dilation and curettage on another patient; lacked judgment in performing vaporization of endometriosis on a third patient; and failed to provide these patients with a written or dictated history and physical examination on their charts at the time of the laser procedures. In addition, upon review of this evidence, Dr. Fobbs still maintained that he had done no wrong.

(Pet.App. 9a.) This evidence clearly shows that Petitioner's patients had been exposed to poor medical judgment and unnecessary procedures which Petitioner refused to acknowledge. Therefore, contrary to Petitioner's claim, the record supported the MEC's conclusion that there was a potential for imminent danger if the restraint was not imposed. (Pet.App. 8a-9a.)

Under the statutory scheme, due process is satisfied if subsequent to the summary imposition of restrictions, there is some "notice and hearing and other adequate procedures" for appeal of the administrative determination. Petitioner indisputably received notice and had the opportunity for a hearing after the summary imposition of monitoring. (Pet.App. 30a and 58a-59a.) Thus, there is no substantial issue as to whether Petitioner was afforded notice and due process.

**B. The peer review actions complied with the Health Care Quality Improvement Act standards.**

Finally, Petitioner disagrees with the manner in which the lower courts applied HCQIA standards to the intermediary hearings and their findings that the peer review actions taken complied with those standards. (Pet.App. 7a-10a, 50a-52a and 56a-59a.)

The District Court's determination of this issue was based in part upon Petitioner's refusal, without good cause, to proceed with the JRC Remand Hearing; and his concomitant forfeiture of rights under the statute. 42 U.S.C. § 11112(b)(3)(B). The defect in the JRC hearings in September of 1987 and January of 1988, whereby Petitioner was not allowed to voir dire the JRC panel, was acknowledged by the MEC. Petitioner then was afforded a new JRC Remand Hearing with the right to voir dire a new JRC panel which would hear the evidence *de novo*. (Pet.App. 31a-32a.) Thereafter, Petitioner refused to participate in

either the voir dire of the new JRC panel or the JRC Remand Hearing. (Pet.App. 33a.) The District Court affirmed the finding of the JRC Remand Hearing that Petitioner's "failure to appear was not supported by good cause." (Pet.App. 33a and 59a.) Under § 11112(b)(3)(B) of the HCQIA, where a physician refuses to participate in a hearing without good cause, he forfeits his right to a hearing. § 11112(b)(3)(B) provides that:

> "the right to the hearing may be forfeited if the physician fails, without good cause, to appear."

Petitioner was afforded due process in this case; he simply "opted not to exercise his right thereto." (Pet.App. 59a.) As a result, he was deemed under the statute to have forfeited his right to a hearing with respect to the summary imposition of monitoring.

Moreover, a mere procedural defect in a hearing does not constitute a failure to meet HCQIA standards. Section 11112(b)(3) provides that

> "[a] professional review body's failure to meet the conditions described in this subsection shall not, in itself, constitute failure to meet the [notice and hearing requirements]."

The determination of whether peer review actions meet the HCQIA standards is a matter requiring a full evaluation of the entire record. The District Court reviewed the evidence with regard to the "defects" in the JRC hearings in September 1987 and January 1988 and concluded that the hearing process had been conducted fairly in accordance with those standards. There is no purported "conflict" (Pet. 20) between the Ninth Circuit's affirmance of that determination in this case and the definition of "peer review action" articulated in its prior decision of *Austin v. McNamara*, 979 F.2d 728 (9th Cir. 1992). The immunity provided by the HCQIA was correctly applied to both

Physician Respondents and Saint Agnes. *See Imperial v. Suburban Hospital Assn., Inc.*, 37 F.3d 1026, 1030 (4th Cir. 1994); *Bryan v. James E. Holmes Regional Medical Center*, 33 F.3d 1318, 1322, 1337 (11th Cir. 1994).[2]

The Petition amounts to nothing more than a request to reexamine and reweigh these findings contrary to the principle that it is not the function of this Court "to grant a certiorari to review evidence and to discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). The Ninth Circuit's decision upholding dismissal of Petitioners' claims is correct. It does not conflict with any decision of this Court or any other Court of Appeals. Accordingly, there is no substantial issue warranting review by this Court.

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[2]It is indeed puzzling for Petitioner to contend that the recognition of procedural defects, and the correction of them during the administrative appeal process, somehow rendered the proceedings unfair and abrogated Respondents' HCQIA immunity. As the District Court aptly put it, "This is nonsensical. The standard is intended to apply to discrete decisions, not to an ongoing course of conduct. . . . [¶]It would be a nearly insurmountable chore for these defendants, or any defendants, to attempt to prove HCQIA immunity for each aspect of their entire course of conduct in response to a plaintiff's general allegations of misconduct. Such a duty would reduce the efficaciousness of the HCQIA and defeat Congress' stated purpose in promulgating it." (Pet. App. 52a.)

## CONCLUSION

For all the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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